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Summary record of the first part (public)* of the 3055th meeting**
Held at the Palais Wilson, Geneva, on Friday, 21 March 2014, at 10 a.m.

Chairperson: Sir Nigel Rodley

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** No summary record was issued for the 3054th meeting.

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The meeting was called to order at 10.05 a.m.

Organizational and other matters, including the adoption of the report of the pre-sessional working group on individual communications

Draft general comment No. 35 on article 9 of the Covenant (continued)
(CCPR/C/GC/R.35/Rev.2)

1. **The Chairperson** invited Committee members to consider new paragraph 69 bis (document without a symbol, in English only) proposed by the Rapporteur.

2. **Mr. Neuman** (Rapporteur for the general comment) recalled that the aim of the paragraph was to give more explicit coverage to the issue of so-called "preventive or security" detention, particularly in a context other than international armed conflict. He read out the paragraph, in which the Committee said that detaining persons without charges, solely because they were suspected of being a threat to the security of the State, presented severe risks of arbitrary deprivation of liberty. In the context of international armed conflict, such risks were mitigated by compliance with the rules of international humanitarian law, but outside that context, the Committee considered that security detention was compatible with the Covenant only pursuant to a derogation from article 9, paragraph 1, that accorded with all the requirements of article 4, including the requirements of strict necessity and proportionality. Even in that case, security detention generally remained incompatible with the Covenant, unless a series of conditions were met. The conditions were listed in subparagraphs (a) to (h) of draft paragraph 69 bis.

3. **Mr. Rodríguez-Rescia** said that, since the Committee could not base itself on concrete cases addressed in individual communications, it had to show the utmost care and avoid setting out conditions that might allow a derogation from article 9 for national security reasons, as the concept remained vague and abstract, and had already been used, in some countries, to justify unlawful detention, repressive policies, widespread persecution and systematic violations. A person's arrest had to be based on facts, and not on the hypothetical risk that the person might pose to national security.

4. **Mr. Bouzid** asked whether the expression "preventive or security detention" covered administrative detention. With regard to the condition laid down in subparagraph (h), namely that there had to be a limit to the length of detention, he said that it would be advisable to set the maximum length and monitor respect for it.

5. **Mr. Kälin**, recalling general comment No. 8, said that the Committee had always held that security detention came under article 9, and yet, in the proposed paragraph, it referred to article 4, which amounted to saying that any derogation that did not satisfy the conditions listed in paragraph 69 bis did not comply with the principle of proportionality. That change of approach should be discussed in depth. From the new perspective, paragraph 69 bis would logically follow the paragraphs dealing with derogations, but if, on the other hand, the Committee should decide that security detention came under article 9 and not article 4, the paragraph should be moved closer to paragraph 42.

6. **Mr. Shany** said that by holding that only by derogation could security detention be made compatible with the Covenant, the Committee was adopting an overly rigid stance compared to its treatment of other forms of extrajudicial detention, such as involuntary commitment and certain kinds of preventive detention. It would be better to indicate that security detention could be subject to derogation, keeping open the possibility of considering other, potentially related forms of detention on a case-by-case basis. In respect of the list of conditions, it would be advisable to add the obligation to inform detainees and their counsel of the evidence on which the detention was based.

7. **Ms. Chanet** said that the Committee could not rewrite the Covenant by introducing derogations from article 9 on grounds of public safety concerns and subject to a certain number of conditions, which would not be monitored except during the consideration of periodic reports.

8. **The Chairperson** said that he preferred to refer to "administrative detention" rather than "preventive" or "security" detention. He recalled that, in its general comment No. 8, the Committee had suggested that it accepted the principle of administrative detention on political grounds, and that such deprivation of liberty complied with article 9. That approach had been criticized, with some feeling that it encouraged the kind of abuse mentioned by Mr. Rodríguez-Rescia, and the Committee should avoid giving the same impression again. Rather than being silent on that form of detention and as a consequence having no say on the matter and offering no relevant guidance to States parties, it would be preferable to specify the conditions under which it could be used. Currently, there was de facto derogation from article 9 by States parties, and it was left to the national courts to verify the legality of detentions. The Committee could not ignore that reality. The purpose of the proposed text was to set conditions that made resorting to such a measure as difficult to justify as possible.

9. **Ms. Chanet** recalled that it was States parties that laid down the reasons for deprivation of liberty in their legislation. That was what the Committee monitored, and it could not decide whether to conduct such monitoring merely on the basis of specific criteria that it had institutionalized without being mandated to do so. The proposed approach would offer ill-intentioned authorities a very practical means of committing violations.

10. **Mr. Kälin** said that the Committee should not establish that administrative detention on political grounds could be lawful by way of derogation, but instead underline that it always constituted arbitrary deprivation of liberty. In terms of administrative detention on security grounds, however, the Committee could acknowledge that, outside the context of international armed conflict, there might be highly exceptional circumstances in which the legitimate interests of States parties could be at risk. In that event, it would be advisable to define the circumstances and all applicable safeguards, as was the case in international humanitarian law. That would leave the Committee complete freedom, in the context of the consideration of communications and dialogues with States parties, to emphasize the limits of what was allowable under the Covenant.

11. **Mr. Fathalla** said that he did not see how subjecting deprivation of liberty to certain conditions was reconcilable with article 9, paragraph 1, which authorized such deprivation only for reasons specified by law. States parties would otherwise be able to maintain that deprivation of liberty was governed by their own legislation, irrespective of the conditions laid down in the Committee's general comment.

12. **Mr. Shany** recalled that, in two communications concerning asylum seekers who had been detained for an indefinite period in Australia, the Committee had found a violation because of the State party's failure to comply with safeguards, and not because of a derogation from article 9. On a separate note, he said that it would be preferable to avoid referring to administrative detention "on political grounds", since that sort of motivation fell outside the Committee's jurisdiction.

13. **The Chairperson** confirmed that the expression "administrative detention", which was taken from general comment No. 8, had to be used as it was. He noted that most members were opposed to the idea expressed in the new paragraph, namely that States parties could have recourse to administrative detention provided that a certain number of conditions were met.

14. **Mr. Neuman** (Rapporteur for the general comment), while admitting that the existence of a list of conditions under which the use of administrative detention for security

reasons was acceptable might legitimize and encourage the practice, pointed out that strictly regulating that form of detention was also the best way of submitting States to safeguards. He drew attention to the fourth sentence in the paragraph, in which it was stated that, even in the case of a derogation from article 9 in accordance with article 4, security detention would *generally* remain incompatible with the Covenant. The word "generally" had been used deliberately, as there were scores of situations described as exceptional by States parties that the Committee did not regard as such.

15. **Ms. Seibert-Fohr** said that she shared the concerns expressed by Ms. Chanet and Mr. Rodríguez-Rescia, even though she did understand the Rapporteur's intentions. There was indeed a risk of certain States parties thinking that they would be allowed to resort to administrative detention as soon as all the conditions were met. To that end, they might be tempted to make more frequent use of states of emergency, which was the exact opposite of what the Committee was trying to achieve. The Committee should therefore give a very precise definition of administrative detention on security grounds and make clear that the list of conditions was not exhaustive. In that way, it would retain some room for manoeuvre, and it could decide whether administrative detention was compatible with the Covenant on a case-by-case basis, even when all the conditions were fulfilled.

16. **The Chairperson** said that he doubted that it would be possible to arrive at a precise definition of administrative detention on security grounds.

17. **Mr. Ben Achour** recalled that the aim of general comments was to clarify matters that were obscure rather than to open the door to potentially dangerous interpretations. The Committee should refrain from laying down rules and settle instead for providing guidance to States, which would allow it the necessary leeway to interpret article 9 on a case-by-case basis.

18. **Ms. Majodina**, concurring with Mr. Ben Achour, said that the subject of the proposed paragraph should rather be addressed in paragraph 42.

19. **Mr. Flinterman** and **Ms. Waterval** said that in their view the issue had already been covered in paragraphs 42 and 68.

20. **Mr. Iwasawa** said that the Committee had to take great care when formulating new rules and rely on its jurisprudence. He suggested revisiting the issue of derogations at the time of the second reading of the draft.

21. **Mr. Neuman** (Rapporteur for the general comment) said that a decision on the content of the paragraph, if only provisional, should be taken at the current session to allow stakeholders to send in their comments to the Committee.

22. **Ms. Chanet**, supported by **Mr. Shany**, said that it would be sufficient to present the conditions not as derogations, but as obligations.

23. Following a vote by show of hands, **the Chairperson** noted that the majority of Committee members would like the subject of the paragraph to be dealt with in the body of the draft. He therefore proposed that the Rapporteur draft the text. It might be necessary to split the paragraph in two, separating the issue of safeguards one from that of derogations from article 9.

24. **Ms. Chanet** said that the main difficulty lay in making it clear that all use of administrative detention had to comply with certain rules, and that States had to supply suitable grounds to justify it, without suggesting that respecting the safeguards listed was enough for detention to be automatically considered legitimate by the Committee.

25. **Ms. Siebert-Fohr** said that one solution might be to mention the safeguards as examples only, especially insofar as they were considered to be derogable.

26. **Mr. Shany** said that a degree of flexibility could be preserved by referring to a "general rule" in relation to the required safeguards.

27. **The Chairperson** invited Committee members to give their opinion more specifically on the safeguards listed in subparagraphs (a) to (h) of the draft paragraph.

28. **Mr. Neuman** (Rapporteur for the general comment), referring to the condition set out in subparagraph (f), according to which the State's obligation to justify the need for detention increased with the length of that detention, wondered whether that meant that, after a certain period of time, States would have to justify the detention beyond reasonable doubt, as they would in criminal proceedings.

29. **The Chairperson** said that the concept of elasticity of the burden of proof, although new, was akin to the principle of proportionality of the punishment. He proposed not suggesting any initial standard of proof.

30. **Mr. Kälin** said that he was in favour of the principle of the burden of proof being proportional to the length of the detention, but recalled that the content of the paragraph would depend on its position within the general comment.

31. **Mr. Shany** said that he also endorsed the general principle, but that the possibility of regarding the initial standard of proof as being sufficient, without demanding new evidence over time, should be retained. He suggested that reference should also be made to the requirement to supply detainees with certain information. In addition, the Committee could recommend criminal rather than administrative proceedings, and require that detainees should, as a general rule, be able to choose their legal representative.

32. **Ms. Chanet** said that some of the safeguards laid down in the previous general comment on article 9 were missing. She was of the opinion that no upper limit should be established for the time between periodic reviews of the validity of detention, as States could use the limit, which was set at six months in the draft paragraph, as a basis for justifying needlessly lengthy detention. There was no jurisprudence on which the Committee could draw in laying down such a rule.

33. **The Chairperson** explained that the text had been drafted on the assumption that article 9 would be complied with, and aimed to provide additional safeguards. The Committee knew that reviews of detention were sometimes far less frequent in some States and, on the other hand, it was not aware of any countries in which they occurred more regularly than biannually for that type of detention. It therefore seemed useful to set a maximum period.

34. Noting that the Committee appeared to agree on the idea of keeping the proposed paragraph, but that it should be moved closer to paragraph 42 to prevent it from being read in the context of derogations from the Covenant, and that the list of required safeguards should not be included, he invited the Rapporteur to submit a revised version of the paragraph for consideration and adoption at a subsequent meeting.

35. *It was so decided.*

The first part (public) of the meeting rose at 12.35 p.m.